


Administrative Office of the Courts

Chief Justice Richard C. Howe
Chairman, Utah Judicial Council

MEMORANDUM

Daniel J. Becker
State Court Administrator
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Deputy Court Administrator

To: Heather Mackenzie Campbell, Audit Manager
Julie D'Alesandro, Internal Auditor
Rick Schwermer, Assist. Court Administrator

From:  Brent Johnson, General Counsel

Re: Utah Code § 41-6-167 and Sandy Justice Court

Date: April 8, 2002

At the request of Jay Carey, I have reviewed the Utah Supreme Court case of Woytko v. Browning, 659 P.2d 1058 (UT 1983). After reviewing this case, my original opinion will change somewhat. The key issue is whether the "tickets" that officers issue are to be considered promises to appear or citations. If they are, or can be, promises to appear, then § 41-6-168 can be used. If they are citations, then § 77-7-19 is used. I am still convinced that § 77-7-19 is the appropriate charging statute and I will explain why below. The language in my original memorandum concerning the magistrate must change, but my ultimate conclusion remains the same. My first opinion was predicated not only on appearance before a magistrate, but also on a person being "arrested." The condition of being "arrested" is still an important requirement under § 41-6-167.

Let me first explain why I think § 77-7-19 is to be used in all citation cases, including traffic matters. I believe the relevant Woytko language is dicta and I disagree with the premise of that language. The only thing that Woytko and other authorities provide is argument that § 41-6-168 could also be used, as an alternative to § 77-7-19. However, even granting Sandy City that possibility, there is ample evidence that § 77-7-19 should be used for traffic citations. It may be best to deal with this on a prospective basis and make certain we are consistent in the future. It is important to defendants, and state and local governments that this issue be resolved. I will explain the positions for your information.

In Woytko, a defendant was arrested for DUI. He was taken to jail and booked. He was subsequently released without bail by "an officer of the court" after signing a promise to appear. Mr. Woytko subsequently claimed that the trial court did not have jurisdiction because he was not taken to the nearest magistrate as required by § 41-6-166 for DUI arrests. The Utah Supreme Court

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efficient, and independent system for the advancement of justice under the law.**

disagreed with the defendant, finding that the local magistrate had delegated bail and release authority to an officer of the court and therefore Mr. Woytko had, in fact, been admitted to a magistrate under § 41-6-166.

Mr. Woytko then claimed that the written promise to appear did not comply with § 41-6-167 and therefore the court did not have jurisdiction. The language of § 41-6-167 states that “upon any violation of this act punishable as a misdemeanor, whenever a person is immediately taken before a magistrate as hereinbefore provided [etc.] . . .” The defendant’s contention was that, even though he was taken before a magistrate, the written promise to appear he signed after being taken to the magistrate did not comply with the statute. The court stated that the statute was not jurisdictional and in any event it did not apply because, when the statute was originally enacted, the word “not” was inadvertently omitted from the enrolled bill.¹ The court implicitly stated that the statute should read: “upon any violation of this act punishable as a misdemeanor, whenever a person is not immediately taken before a magistrate as hereinbefore provided [etc] . . .” I do not dispute the court’s conclusion on this fact. The court could have (and probably should have) limited its conclusion to that statement, but the court went on to state that “the only logical reading of the statute is that it has application only when a citation is issued in lieu of an arrest and no appearance is made before a magistrate.” It bears repeating that this language is dicta because the statute did not apply to the defendant. The defendant was not issued a citation. He was arrested and taken to a magistrate and the court’s statement had no bearing on his situation.

The court’s dicta is potentially wrong for several reasons. The specific language of the statute states that the promise to appear applies to an “arrested person.” It is therefore contradictory for the court to state that the promise to appear is used “in lieu of an arrest” when the person must, in fact, be under arrest. Also, the Legislature was apparently aware of the differences between a “promise to appear” and a “citation.” Section 41-6-172² makes a distinction between a promise to appear and a traffic citation. The Legislature apparently recognized these as being different.

My interpretation of the statute is admittedly hampered by additional dicta in State v. Harmon, 910 P.2d 1196 (Utah 1996) in which the court stated that the word “arrest” as passed in 1935 and used in § 41-1-17 meant “seizure or detention, not a formal, custodial arrest.” The court was thus saying that the word arrest has different meanings in different contexts. I do not necessarily disagree with this ultimate statement, but I again disagree with the statement in that case and do not think it

¹When § 41-6-167 was enacted, it originally contained the word “not.” When the section was amended in 1949, the word “not” was inexplicably omitted from the enrolled version.

²This statute was enacted in 1949 and made references to both a promise to appear and a traffic citation. Unfortunately, I can’t find any other legislative reference to a traffic citation at the time. However, it is apparent that both the citation and the promise were in the lexicon of the day, and had different meanings.

was necessary in relation to these particular statutes.³ In stating that the word arrest is equated with “detention” and not “custody” the court’s definition of arrest in § 41-1-17 cannot be extended to § 41-6-167 because one of the conditions of the promise to appear, as found in paragraph (4)(b)(ii) is that the defendant immediately be “released . . . from custody.” (emphasis added) The arrest contemplated is custodial and not a mere highway detention.

The relevant statutes were passed in 1935 and after, and it is possible that the Legislature intended certain meanings. However, since that time, there has developed a significant body of case law that discusses what constitutes an arrest and the differences between investigative detention and formal arrest. The citation statute at § 77-7-18 was passed in response to that changing case law. All of the statutes must be read harmoniously and in conjunction with that case law.

My interpretation of the relevant statutes would be this: When a law enforcement officer detains a person who has violated traffic laws, the officer has the option of arresting the person or issuing the person a citation. If a citation is issued, it is issued under Utah Code Ann. § 77-7-18. If the officer arrests the person then there also two options. The officer can take the person to a magistrate (and is mandated to do so in certain circumstances) under § 41-6-166. If the arrested person is not taken before a magistrate, the officer must release the arrested person when the person signs a written promise to appear under § 41-6-167.

There are several reasons why I believe this interpretation is important. As previously stated, it avoids giving the word “arrest” a loose definition of mere detention. By having a more consistent definition of arrest the state avoids other potential problems. For example, case law indicates that a person and his or her vehicle can be searched incident to a lawful arrest. A person who has been issued a citation cannot be subject to search because it is not a custodial arrest. Knowles v. Iowa, 525 U.S. 113. There is a clear constitutional distinction between citation and arrest and this interpretation helps promote that distinction. Also, if, under § 41-6-167, a person is considered arrested, this opens the door for all law enforcement officers to be designated as bail commissioners. As we have previously discussed, bail commissioners can designate and collect bail for persons who have been “arrested.” § 10-3-920 and § 17-32-1. If Woytko is read to its extreme, officers may begin the practice of collecting bail during routine traffic stops before allowing the “release” of a defendant. This is a practice which is potentially coercive and our office opposes.

Also, we are aware that defendants often refuse to sign citations, but officers still give them the citation and expect them to appear in court. We have always instructed courts that they can proceed under the citation as if the person had signed. However, this is true only if the citation was issued under § 77-7-18. If the officer is using Title 41 for issuing the “citation” and the person refuses to sign, the defendant must be taken to a magistrate and cannot be released.

³The conclusion did not apply to the defendant because she had been formally arrested. The statement was again dicta.

Perhaps more importantly, according to § 77-7-21, a defendant may voluntarily forfeit bail under a citation and the forfeiture can be treated as a conviction. This cannot occur with a promise to appear. According to the same section, a citation can be used in lieu of an information in certain circumstances. Again, there is not a similar provision for promises to appear. The only way that we can collect bail and fines, and forfeit the money as a conviction without the defendant's appearance, is if we consider these to be citations under § 77-7-18, and not promises to appear under § 41-6-167.

There are a couple of other important differences between a written promise to appear and a citation. According to § 41-6-167, the written promise designates "the time and place the person shall appear in court." While a citation designates "the time and date on or before and after which the person is to appear." The citation gives a window of time for appearing while the written promise apparently gives a specific time. My guess is that the actual practice is to give defendants a window, consistent with citations.

There are two other sources which provide for use of § 77-7-19. Rule 4-701 of the Code of Judicial Administration sets forth the procedure to be followed when a person fails to appear on "Parking, Traffic and Infraction Cases." The only statute that is referenced in support of the failure to appear charge is § 77-7-19. It could be argued that the rule does not exclude the use of § 41-6-168, but it supports the fact that it is more appropriate to use § 77-7-19.

Also, the Attorney General's Office recently distributed a memo about traffic schools (copy attached). In the memo, the A.G.'s Office referenced the citation statutes in Title 77, Chapter 7 implicitly noting that traffic citations are issued under that authority, and not Title 41, Chapter 6.

Finally as previously noted, there is a fairness issue for defendants. According to the bail schedule, a violation of § 41-6-168 is \$70.00 and a violation of § 77-7-22 is \$92.50. There is no reason defendants should be treated differently based on where they are charged (as opposed to with what they are charged). Based on the different penalties, there should be logical reasons as to when each statute applies. This may also raise equal protection concerns.

In light of Woytko, Sandy City has an argument for §41-6-168. However, all of the other references support § 77-7-19. In my opinion, the state has not committed an error for which a refund would be appropriate. If Sandy City wishes to pursue the issue they can go directly to State Finance and make their arguments. We should decide whether there are sufficiently important policies that weigh in favor of prospectively resolving this issue once and for all. Please let me know if you have any questions.